YONG TONG HONG v. SIEW SOON WAH & ORS.

[F.C. (Ong C.J. (Malaya) Suffian and Gill F.JJ.)
April 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 119 of 1970].

Landlord and Tenant — Permanent tenancy granted in consideration of payment towards cost of building premises — Tenancy for "as long as the tenant wishes to occupy" — Whether void for uncertainty — Tenant in possession — Equity — Tenant entitled to specific performance — Contracts (Malay States) Ordinance, 1950, s. 30.

Land Laws — Lease in perpetuity — Instrument not registrable as a lease — Agreement for a lease — Maximum term for a lease of alienated land — Thirty years — National Land Code, s. 221 (3)(b).

The appellant was requested by the proprietor of premises, which were then nearing completion to pay $8,000 on his behalf to the building contractor. The appellant was then let into occupation of the ground floor at a rent of $150 per month (later raised to $200 per month). An agreement was entered into whereby the landlord agreed to give a permanent tenancy of the premises or (as stated in the uncertified translation) a tenancy "as long as the tenant wishes to occupy". It was also agreed that the landlord should not increase the rent of the premises as he likes or eject the tenant. The property was subsequently transferred by the original proprietor to the respondents. The respondents demanded an increased of the rent and on the appellant's refusal to agree, the respondents gave notice terminating the tenancy. The respondent then brought an action for recovery of possession and the learned trial judge gave judgment in their favour on the ground that the tenancy being of indefinite duration was void under the provisions of section 30 of the Contracts (Malay States) Ordinance, 1950.

Held, allowing the appeal: (1) as the appellant in this case had expended money on the land of another in the expectation of being allowed to remain in occupation, equity would protect his occupation of the land;

(2) there was no uncertainty in the minds of the contracting parties, as to the period of the lease, the parties had expressly agreed upon a permanent letting and the landlord had bound himself not to increase the rent except upon a rise in assessment. The landlord had no grounds for increasing the rent and the appellant's refusal to yield to his landlord's demand gave the latter no legitimate excuse for issuing his notice;

(3) the court would give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows which, under the provisions of section 221 (3) (b) of the National Land Code is a maximum period of 30 years.

Observations on necessity for certified translations of documents.

Hajara Singh v. *Muthukaruppan*(1) differed from.

Cases referred to:-

(1) *Hajara Singh* v. *Muthukaruppan* [1967] 1 M.L.J. 167.
(2) *M.P.R.L. Karuppan Chetty* v. *Suah Thian* (1916). 1 F.M.S.L.R. 300.
(3) *Zimbler* v. *Abrahams* [1903] 1 K.B. 577.
(4) *Kusel* v. *Watson* 11 Ch. D. 129.
(5) *Plimmer* v. *Wellington Corporation* (1884). 9 App. Cas. 699.
(6) *Inwards* v. *Baker* [1965] 2 W.L.R. 212, 213.
(7) *Lee Ah Low* v. *Cheong Lip Kien* [1970] 1 M.L.J. 7.
(8) *Parker* v. *Taswell* (1858), 2 De G. & J. 559; 44 E.R. 1106.
(9) *Charles Clay & Sons Ltd.* v. *British Railways Board* [1970] 2 W.L.R. 1328, 1332.
(10) *Lin Nyuk Chan* v. *Wong Sz Tsin* [1964] M.L.J. 200, 204.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

K. L. Devaser for the respondents.

Cur. Adv. Vult.

Ong C.J. (Malaya): Yong Tong Hong, the firm name under which the appellant carries on the business of a sundry goods shop, was tenant of the entire ground floor of premises No. 61 Jalan Pasar Bharu, Kuala Lumpur, since 1958. The landlord then was one Siew Kim Chong, father of the respondents to whom the property was subsequently transferred on September 19, 1967. Being dissatisfied with the decision of the High Court ordering him to deliver up vacant possession of the premises, the appellant now appeals to this court.

The facts which emerged at the close of the evidence on both sides are clear beyond dispute. The premises are not protected by rent control. In 1958, while the building was nearing completion, the appellant was requested by its then proprietor, Siew Kim Chong, to pay $8,000 on his behalf to the building contractor. The appellant was then let into occupation of the ground floor at a rent of $150 per month. This letting of course postulates an agreement regarding the tenancy. On April 9, 1964 the landlord gave notice to the appellant demanding an increase of rent to $220 *per mensem*. After some haggling the new rent was fixed at $200. Still not content, the landlord again gave notice on October 4, 1966 terminating the appellant's tenancy on November 30, 1966 unless he accepted a new tenancy from December 1 at $300 *per mensem*. This offer was rejected by the appellant on the ground that the landlord had agreed in writing that the rent at $200 *per mensem* would not be further raised except upon an increase in assessment of the whole building, and then only according to the percentage of rise in the assessment.

The landlord, however, denied having made any such agreement as alleged; upon being supplied a photostat copy thereof, he even denied receipt of the cash payment of $8,000 and claimed that the agreement was a forgery, for which he would be taking criminal proceedings. This threat was not carried out, but lengthy infructuous correspondence followed regarding the proposed submission of the disputed agreement to the Government's Document Examiner for forgery tests. After the transfer of the property to these respondents in September 1967 notice was served on the appellant in the following October that ejectment proceedings would be taken against him pursuant to the notice to quit given by their predecessor in title dated October 4, 1966. The action was commenced on October 26, 1967. It came on for trial on February 27, 1970 and judgment was given against the appellant on November 16, 1970.

The learned trial judge took the view that the fundamental issue to be decided was whether any written agreement was made as alleged; and, if so, whether it was valid and enforceable. The document

in question was produced by the appellant as Exhibit D.2. It was written in Chinese, bore the signatures of the parties and was stamped at the Stamp Office in Kuala Lumpur for a fee of $120 paid on June 9, 1964. Alongside the Chinese writing appeared the rough English translation thereof, made apparently for purposes of stamp duty only and reciting the consideration of $8,000 as paid for a tenancy to endure "as long as the tenant wishes to occupy".

The solicitors for both parties seemed to have entirely overlooked the provisions of R.S.C. Order 66 rule 8, regarding the use of certified translations. For an appeal record the same rule applies and is reproduced in rule 94 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963. Upon noticing a material error in the rough translation while perusing the Chinese writing I have, in the interests of justice, caused a certified translation to be made by the official interpreter. It reads: —

"The person Siew Kim Chong executing this document has built a shop house situated at No. 61, Jalan Pasar Bahru, Kuala Lumpur.

He desires to lease out the whole of the ground floor to Chop Yong Tong Hong and the tenancy shall be permanent.

It is clearly stated here that the rent per month shall be $200.00 of Malayan currency and hereinafter the person leasing out this house shall not increase the rent as he likes or eject the tenant by force etc.

If the rent is to be increased or reduced, the increase or reduction shall be carried out in accordance with the provisions of government proclamations and the percentage in the increase or reduction of rent shall be determined proportionately by the increase or reduction in assessment.

A deposit of $8,000.00 was received on the 1st day of February, 1958 and as it is feared that verbal words are not proof this document is written as evidence."

Had a proper translation been produced at the trial, much needless confusion would have been avoided. On a distorted picture presented by the bad translation the learned trial judge was forced to certain findings of fact adverse to the appellant. His decision, however, turned entirely on the question of law. Even assuming the agreement to be true, he considered himself bound by authority to hold it void for uncertainty since a tenancy of indefinite duration was in breach of the provisions of section 30 of the Contracts (Malay States) Ordinance 1950: see *Hajara Singh* v. *Muthukaruppan*.[1] In that case the tenancy was "for as long as the tenant wished during his lifetime", which the judge thought indistinguishable from the words here used in the rough translation of the agreement.

The question which we now have to decide is the effect to be given to the agreement that "the tenancy shall be permanent" — or, in the words which fell to be decided by the learned trial judge, "for as long as the tenant wished to occupy". In the case of *Hajara Singh*[1] the tenant had built a house in 1952 (which he still occupied in 1965) pursuant to an agreement with the landlord, Jaganath, to pay him ground rent at $4 per month, in consideration whereof Hajara Singh could stay "for as long as he wished during his lifetime". After Jaganath's death his successors in title gave Hajara Singh 6 months notice to quit. It was held by the Federal Court that the agreement was void for uncertainty in respect of length of tenure and that, "even if there had been a valid contract the appellant had been given reasonable notice to vacate". In holding the agreement void Barakbah L.P. purported to follow the decision in *M.P.R.L. Karuppan Chetty* v. *Suah Thian*,[2] where the agreement was that, in consideration of $35 paid by the chetty to Suah Thian, the landlord would rent to the chetty a house then under construction at $35 a month "for a period of as long as he likes". After completion of the building the landlord refused to give possession to the chetty who then sued for possession and damages. On the facts, therefore, the cases of *Hajara Singh*[1] and *Karuppan Chetty*[2] were vastly different. In the older case Sir T. Braddell C.J.C. referred, not only to *Zimbler* v. *Abrahams*[3] but also to *Kusel* v. *Watson*,[4] where it was agreed that the defendant might have a sub-lease at any period he might feel disposed and the plaintiff would not sublet or disturb him or raise the rent, and the defendant having gone into possession and laid out money in improving the property, the defendant was held entitled to a sub-lease for the residue of the term of the plaintiff's lease, if he should so long live. Sir T. Braddell then went on in his judgment to say at page 303 as follows: —

"Another distinction to be noticed between this and the case I have referred to is that the plaintiff was never let into possession under the agreement but is relying upon this document to entitle him to claim possession or alternatively to damages for its breach. Unless therefore it appears from the agreement, as evidenced by the document, that the defendant has agreed to grant him such an interest as a court of equity would specifically enforce, his claim to possession must fail and with regard to his claim at law for damages, as the agreement has been reduced to writing, the document constitutes the only evidence of its terms and if its meaning is uncertain or incapable of being made certain it is a void agreement under section 29 of the Contract Enactment and is not enforceable by law."

The passage just quoted shows that as long ago as 1916 it was recognised that where a tenant has gone into possession in circumstances which gave him such an interest as a court of equity would specifically enforce, he should be in a stronger position to resist the landlord's claim to possession than the ordinary tenant who had no answer on equitable grounds. Thus Karuppan, in the one case, had suffered no damage by the breach of contract other than $35, which the court ordered Suah Thian to repay; moreover, there were no grounds — such as part performance and outlay on improvements by him as tenant in possession — which would entitle him to specific performance. By contrast, Hajara Singh, in the other case, had asserted in his affidavit, without contradiction, that had he not been led to believe that he would be left in undisturbed possession during his lifetime, he certainly would not have built his dwelling-house (which was a building of a semi-permanent nature) on the landlord's property. That Hajara Singh should have been given unconditional leave to defend — instead of being precluded from doing so by the summary judgment given against him — is, in my opinion, clear from authorities of long standing, such as *Plimmer* v. *Wellington Corporation*,[5] a decision of the Privy Council. There was also the then recent decision in 1965 of the Court of Appeal in England in *Inwards* v. *Baker*[6] holding that:

"where a person expended money on the land of another in the expectation, induced or encouraged by the owner of the land, that he would be allowed to remain in occupation, an equity was created such that the court would protect his occupation of the land, and the court had power to determine in what way the equity so arising could be satisfied."

With respect, therefore, I am of opinion that the decision in *Hajara Singh* v. *Muthukaruppan*[1] was given *per incuriam* and not binding on this court. It has unfortunately been a source of error in not a few subsequent cases in the High Courts.

Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds. An example is *Lee Ah Low* v. *Cheong Lip Kien*,[7] a recent decision of this court. There the tenant was given a tenancy for 80 years during which period the landlord agreed not to increase the rent unless the assessment rate was raised by the Municipality and the tenant was at liberty to use the premises for carrying on any type of business. The monthly rent was $100 and the tenant was given a month's notice to quit. No equity had been created in his favour, as in *Inwards* v. *Baker*,[6] by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being void for non-registration. That case was not as fully argued as it might have been, nor were the cases cited which have been brought now to our attention and carefully distinguished. The *ratio decidendi*, therefore, should not, in my view, be regarded as a binding precedent for all cases where premises are let for a term of years at a monthly rent under a lease void for non-registration.

In the instant case the landlord's claim to repossession is met by a counterclaim for specific performance. As Vaughan Williams L.J. said in *Zimbler* v. *Abrahams*:-[3]

"If the defendant is entitled to specific performance, it follows that he is not liable to be ejected."

In that case the landlord's agent had promised the tenant of a house let at a weekly rent "not to raise any rent as long as he lives in the house and pays rent regular". The plaintiffs, treating the defendant as a weekly tenant, gave him notice to quit and brought an action to recover possession. It was held that the document could not, having regard to its terms, be treated as creating a weekly tenancy, and that whether it purported to be an attempt to create an immediate demise for the life of the defendant, which was void at law as not being by deed, or an agreement to grant a lease for the life of the defendant, he was entitled to specific performance.

On the question of construing the document Vaughan Williams L.J. said, at page 582: —

"I have then to look at the document and ask myself what interest was agreed to be granted by it. I have a difficulty in saying that the interest was to be merely a tenancy from week to week, for that would be to give effect to the earlier part of the document and none to the latter portion. If that is not to be taken as the meaning, the alternative seems to be that it was intended to grant to the defendant a lease of the house for his life subject to two conditions, one that the lessor might turn him out if he did not pay his rent regularly, and the other that the defendant could determine his own life estate by moving out."

And Stirling L.J. said as follows: —

"Having regard, however, to the decision of Lord Chelmsford in *Parker* v. *Taswell*,[8] we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is *a fortiori*."

As far as I am aware *Zimbler* v. *Abrahams* has never been directly overruled. The construction their Lordships put on the document certainly accords with the maxim *ut res magis valeat quam pereat* — that a contract should wherever possible be construed so that the intention of the parties may be carried out rather than frustrated.

A recent English authority of particular relevance hereto is *Charles Clay & Sons Ltd.* v. *British Railways Board*[9] where the proviso in a periodic tenancy agreement, that the landlords should not terminate it unless they required the premises for the purposes of their undertaking, was held to be valid, so that the landlords, not so requiring the premises in fact, were precluded from serving notice to quit, which was therefore invalid and of no effect. As Foster J. said, after citing certain authorities: —

"These cases show that in modern times the parties who agree to a periodic tenancy of premises can contract as between themselves that the notice to quit can be in terms agreed between them, and not in accordance only with the notice which the law would otherwise imply.

I can see no reason why the landlord should not agree that his right to give notice to quit should be restricted as in the present agreement, or that such a provision is repugnant to the nature of the tenancy. Certainly it seems impossible to conclude that it makes the whole agreement void."

This judgment has been affirmed by the Court of Appeal: see *Times Law Report* January 25, 1971, in which Russell L.J. had this to say with regard to certainty as to the maximum duration of the estate: —

"In the ordinary case of a periodic tenancy its duration would depend upon the time that would elapse before either party gave notice of determination. The simple statement of the law that the maximum duration of a term had to be certainly known in advance of its taking effect could not therefore have direct reference to periodic tenancies. The question was whether authority or principle should lead the court to mould or enlarge that simple statement of the law so as to adapt and apply it to such a tenancy.

Their Lordships were in the end persuaded, there being no authority to prevent the court, that it was preferable as a matter of justice to hold parties to their clearly expressed bargain rather than to introduce for the first time in 1971 an extension of a doctrine of land law so as to deny the efficacy of that bargain".

In the instant case it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a "permanent" letting. On the faith thereof, the

$8,000 was paid and the structural alterations made, doubtless at the appellant's expense, as consideration for his remaining in undisturbed occupation for as long as he pleases, provided rent is paid at the rate stated. The landlord had bound himself not to increase the rent except upon a rise in the assessment. In my view the notice of termination of the tenancy was clearly in breach of such agreement and I would follow the decision in *Charles Clay* v. *British Railways Board*[9] by declaring the notice of termination of the tenancy invalid. The landlord had no grounds for increasing the rent and the appellant's refusal to yield to his landlord's demand therefore gave the latter no legitimate excuse for issuing his notice.

As the agreement is in effect tantamount to a lease in perpetuity, does it follow as a necessary consequence that the agreement should be held void for being in breach of the provisions of the National Land Code? In my view the answer is no. As Wylie C.J. (Borneo) said in *Lin Nyuk Chan* v. *Wong Sz Tsin*: —[10]

"When there has been part performance (and especially in cases where a tenant has gone into possession under an agreement to lease) a court of equity will not usually refuse to decree specific performance because of uncertainty as to some subsidiary matter, but will endeavour to give effect to the intention of the parties."

The authority cited by the learned Chief Justice was *Parker* v. *Taswell*[8] in which Lord Chelmsford L.C. said: —

"It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to shew that in such a case the court will strain its power to enforce a complete performance. ... The agreement, moreover, is admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to shew that in such a case specific performance may not be decreed."

As Denning L.J. said in *Inwards* v. *Baker:*

"It is for the court to say in what way the equity can be satisfied."

Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221(3)(b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less.

I need hardly add that the respondents take the premises subject to the agreement which binds their predecessor in title to give the appellant a lease of the premises: see again, *Inwards* v. *Baker* at page 217. Although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. The validity of contracts relating to alienated land or any interest therein is explicitly declared in section 206(3) of the National Land Code.

I would accordingly allow this appeal, dismiss the respondents' claim, give judgment for the appellant on his counter-claim and order and declare that the appellant be entitled until February 28, 1988 to remain in peaceful possession of the ground floor of the premises without let or hindrance by the respondents or their successors in title, so long as the appellant pays rent at the rate reserved by their agreement in writing dated June 1, 1964. The appellant will be entitled to costs of the action and of this appeal.

Suffian and **Gill F.JJ.** concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; K. L. Devaser & Co.*

PUBLIC PROSECUTOR v. OOI KEE SAIK & ORS.

[O.Cr.J. (Raja Azlan Shah J.) May 11, 1971]

[Kuala Lumpur — Criminal Trial Nos. 17, 18, 19 & 20 of 1971]

Criminal Law and Procedure — Sedition — Freedom of speech — Sensitive issues — Seditious tendency — Whether speech has tendency to excite disaffection — Line to be drawn between freedom of speech and sedition — Sedition Act, 1948, ss. 3 & 4.

Constitutional Law — Validity of Emergency legislation — Federal Constitution, Art. 150.

The first accused was charged with an offence under section 4(1) (b) of the Sedition Act, 1948, the second accused was charged with publishing the alleged seditious words and the third and fourth accused were charged with printing the alleged seditious words. The seditious words were alleged to be uttered by the first accused at a dinner held by the Democratic Action Party.

Held: the speeches taken as a whole went beyond the limits of freedom of expression. It accused the government of gross partiality in favour of one group and this was calculated to inspire feelings of enmity and disaffection among the people of Malaysia. The speech was also apt to promote feelings of illwill and hostility among the different races in Malaysia and touched on the sensitive issue of the special rights of the Malays. The speech was therefore expressive of a seditious tendency and the accused must be found guilty.

Observations on when line is drawn between freedom of speech and sedition.

[**Editorial Note:** On September 16, 1971, the Federal Court, by a majority of 4 to 1, allowed the appeal of the second accused on the ground that the High Court trial was a nullity on a technical point, being contrary to sertion 138 of the Criminal Procedure Code (Cap. 6). The Federal Court, however, was satisfied that the conduct of the trial was impeccable. The judgment of the Federal Court will be reported in due course.]

Cases referred to:-

(1) *McFarlane* v. *Hulton* [1899] 1 Ch. 884.

(2) *Wallace-Johnson* v. *The King* [1940] A.C. 231, 240.

(3) *Queen Express* v. *Balagangadhar Tilak* I.L.R. (1897) 22 Bom. 112.

(4) *Burns* v. *Ransley* (1949) 79 C.L.R. 101.

(5) *Niharendu Majumdar* v. *King Emperor* (1942) F.C.R. 38.

(6) *Kedar Nath* v. *State of Bihar* A.I.R. 1962 S.C. 955.

(7) *King Emperor* v. *Sadashiv Narayan* L.R. 74 I.A. 89.

(8) *Queen Empress* v. *Amba Prasad* (1898) I.L.R. 20 All. 55, 69.

(9) *Maniben* v. *Emperor* A.I.R. 1933 Bom. 65, 67.

(10) *New York Times Co.* v. *Sullivan* 376 U.S. 255 (1964).

(11) *A.K. Gopalan* v. *State of Madras* A.I.R. 1950 S.C. 27.